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Supreme Court of the United States

OCTOBER TERM.

No. 625

FELIPE FERNANDEZ,

Petitioner,

against

UNITED FRUIT COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 1st, 1952.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit has been reported in 200 F. 2d 414. Petition for rehearing was denied on December 22, 1952, without opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code (28 U. S. C. 1254 (1)).

Statement.

Petitioner, a seaman, instituted a suit to recover damages involving the loss of both legs. His complaint filed on the civil side of the Court, at law, demanded a jury trial and, stated causes of action for unseaworthiness under the general maritime and for negligence under the Jones Act of Congress.

Some five months before trial his lengthy deposition was taken by respondent before trial pursuant to the Rules of Civil Procedure so that respondent became fully aware of the facts underlying the causes of action. In substance, petitioner claimed that the unseaworthiness and negligence were due to accumulations of water in the alleyway which were caused because the scupper or drain was plugged. Despite repairs, on occasions the scupper or drain was so plugged that members of the crew had to "bail" the water out and had to work two or three days steadily.

As to the unseaworthy condition of the scupper the respondent ascertained this on November 21, 1951 some five months before trial by taking the statements of Simone and H. G. Bodden, employees of long standing with the respondent and in respondent's employ at the time of trial. Simone's specific duty was to keep the alleyway clear and clean.

Also during trial, the report of the respondent to its ship repairer Bethlehem Steel Company, was introduced

showing that on February 11, 1949 on the very trip on which petitioner claimed his injuries, that the respondent had given the ship repairer orders to clear that very scupper. Since it is obvious that if a scupper or drain is functioning properly and is in a seaworthy condition, water goes down the drain, and no attention is paid either to the water or to the drain, the significance of this record made in the ordinary course of respondent's business is considerable, especially when it came toward the close of the case after respondent had protested to the trial court that the records could not be produced.

Respondent could not plead hardship in defending the unseaworthiness count, since its own records and reports apprised it of the unseaworthiness.

The defense to both causes of action is almost the same, i. e., the drain was in good or seaworthy condition and water went down the drain, and no water accumulated.

At the pre-trial hearing which was attended by both parties, an official form was used pursuant to Calendar Rules promulgated by the Judges of the U. S. District Court for the Southern District of New York to supplement Rule 16 of the Federal Rules of Civil Procedure. (This form is attached to the Appendix.)

Paragraph 2 of said official form reads:

> "The parties agreed that the trial of this action shall be based upon the pleadings as amended, except that the following issues raised by the pleadings are abandoned . . . :"

Only the word **"none"** was supplied by both parties and the judge.

Paragraph 8 of said official form reads:

> "The issues to be tried are formulated by the court as follows . . . :"

At the trial, the petitioner sought to introduce proof of unseaworthiness and requested a charge based on unseaworthiness in accordance with the complaint. The Trial Court refused to allow this and held that the petitioner was bound by the pre-trial order and disregarding paragraph 2 and subdivision 8 of paragraph 8, held that only issues of negligence were set up, and that petitioner had thus made an election of remedies and thus emasculated the allegations in the complaint relating to unseaworthiness.

Petitioner repeatedly urged throughout the trial that he was entitled to present proof of unseaworthiness and that he had not waived this cause of action at the pre-trial hearing, **and even set forth written requests to charge unseaworthiness.**

On appeal, the petitioner's brief stressed the fact that the pre-trial order had supplied the word **"none"** to paragraph 2 of the official form of pre-trial order, and therefore the parties had agreed that the trial of the action was on the pleadings since no amendments had been made except that the amount had been increased.

The Court of Appeals held in effect that even though paragraph 2 stated that the parties agreed that the "trial of this action should be on the pleadings", nevertheless paragraph 8 set up issues of negligence, and therefore was controlling, even though the "issues" were in two short lines of subdivision 7 of paragraph 7. It therefore ruled that even though paragraph 2 was rendered meaningless, nevertheless, petitioner was bound by this interpretation of the ambiguous and inconsistent provisions of the official form. And despite the fact that petitioner had maintained that he had not waived the cause of action for unseaworthiness, the Court of Appeals held that petitioner should have "asked" the trial court to amend the pre-trial order, even

though Rule 16 of the Rules of Federal Procedure makes it incumbent upon the trial court to amend the pre-trial order to prevent manifest injustice *upon its own motion* and there is nothing in the Rule about any asking.

And surely manifest justice required that the petitioner should not be bound by an official form ruled to have ambiguous and inconsistent provisions, where this interpretation is to be against him in this serious case.

Questions Presented.

1. Whether Rule 84 of the Rules of Civil Procedure stating that the forms are sufficient incorporates by reference official forms of the various U. S. District Courts promulgated in compliance with the Rules of Civil Procedure and on file with the Supreme Court, under Rule 83.

2. Whether an official form promulgated by the District Court for the Southern District of New York in accordance with the Circuit Conference for the Second Circuit and used by judges and litigants at compulsory pre-trial hearings, may constitutionally be adjudged to have ambiguous and inconsistent provisions by the Court of Appeals of the Second Circuit and to deprive petitioner of a cause of action by construing the official form adversely to him.

3. Whether the liberal construction placed on Rule 16 of the Federal Rules by other Circuit Courts of Appeals is correct or whether the strict construction by the Second Circuit in the case at bar is the correct view.

4. Whether the opinion of the Court of Appeals is contrary to decisions of this Court.

5. Where the trial court is made aware of the fact that a litigant contends that he did not waive a cause of action set forth in the complaint, and the official form is adjudged by the Court of Appeals to be ambiguous and inconsistent, should there have been a modification of the pre-trial order to prevent manifest injustice under Rule 16 of the Rules of Civil Procedure on the trial court's own motion or should there have been an asking by petitioner as the Court of Appeals holds (despite nothing like this is stated in Rule 16).

5. a. Whether the trial court has the constitutional power under Rule 16 of the Rules of Civil Procedure to bind petitioner where he does not agree, and deprive him of a cause of action, when petitioner informs the court that he did neither stipulate away nor waive a cause of action for unseaworthiness and petitioner asks to be allowed to present proof of said cause of action pleaded and to have said cause of action submitted to the jury.

b. Assuming that the trial court has such power, does Rule 16 of the Rules of Civil Procedure require as the Court of Appeals has ruled, that petitioner "should have asked for an amendment of the pre-trial order", or should the trial court have modified the pre-trial order of its own motion to prevent manifest injustice as the Rule states.

6. Whether Rule 46 makes exceptions unnecessary where petitioner has made known to the trial court that he desired the cause of action for unseaworthiness to be presented to the jury and the trial court states with reference to petitioner's written requests to charge unseaworthiness "you needn't elaborate on it because no matter what it is, I am not going to charge it."

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that the official form of pre-trial procedure and order adopted by the U. S. District Court for the Southern District of New York for compulsory pre-trial procedure contained paragraph 2 as meaningless, and inconsistent with paragraph 8, despite the clear and concise language of paragraph 2.

2. In holding that the petitioner could not rely upon the sufficiency of the said official form.

3. In holding that the pre-trial proceedings and order deprived petitioner of his cause of action for unseaworthiness even though pleaded in the complaint and despite the fact that the trial court was told that petitioner did not waive this cause of action and insisted upon its presentation.

4. In strictly interpreting Rule 16 of the Federal Rules of Civil Procedure, contrary to other Courts of Appeals.

5. In holding "the pre-trial order enumerated the only issues to be dealt with at the trial and these were limited to questions raised by the allegations of negligence", where out of 13 subdivisions of paragraph 8 which dealt with the issues only subdivision 7 deals with defendant's negligence in two short lines, and subdivision 8 of paragraph 8 meant to protect the issue of unseaworthiness set forth in the complaint is rendered meaningless.

6. In holding that the two short lines in subdivision 7 of paragraph 8 emasculates the cause of action set forth in

the complaint for unseaworthiness and entire paragraph 2 of the pre-trial order, which is also interpreted as being meaningless.

7. In holding "if the plaintiff wished to present other issues at the trial, he should have asked for an amendment of the pre-trial order which he failed to do", when Rule 16 of the Federal Rules of Civil Procedure requires only that the trial judge shall modify the pre-trial order to prevent manifest injustice, and there is no provision either for a plaintiff to make a motion to the trial judge or to ask.

8. If plaintiff should have "asked" then, in failing to apply Rule 46 of the Federal Rules of Civil Procedure when the trial court told petitioner who had made written requests for a charge of unseaworthiness, "you needn't elaborate on it because no matter what it is, I am not going to charge it".

Reason One for Granting the Writ.

The case is one of extreme gravity.

Petitioner has lost both legs. At the time of trial, he had lost his right leg to the mid-thigh. Since the trial, the left leg has been amputated below the knee. Petitioner has undergone some eight operations and been hospitalized almost three years.

Reason Two for Granting the Writ.

The Court of Appeals has decided an important question of Federal Law which has not been but should be settled by this Court relating to widespread pre-trial procedure under Rule 16 of the Federal Rules of Civil Procedure and relating to the sufficiency of official forms used at compulsory pre-

trial procedure for the congested calendar of the Southern District of New York and other official forms in use throughout the district courts of the U. S.

The holding that not only may not the litigants rely upon the sufficiency of these forms, but that they are to be construed against a party adversely affected by these forms which the Court of Appeals decides has ambiguous and inconsistent provisions should be reviewed. This review should not only be because of petitioner who claims serious injuries but also for the thousands of others whose cases are to be pre-tried with the said forms. It has been estimated that the Southern District of New York alone handles some 20% of all the litigation of the District Courts of the United States.

Rule 16 of the Federal Rules of Civil Procedure has become most important with the widespread use of pre-trial procedure. This Court has not interpreted this rule. Further, district courts like the Southern District of New York, have established special calendar rules using special official forms under Rule 16.

Official forms should be such that they can be relied upon by the practitioner to withstand attack under the rules. There is no principle of law that permits a construction of an ambiguous official pre-trial order to be construed against one of the litigants under such circumstances. In fact, to deprive a seaman of his rights of a cause of action for unseaworthiness is depriving him of substantive rights and impairing his right to a jury trial unconstitutionally. A court rule inconsistent with statute has no force.

Alaska Packers Assn. v. *Pillsbury,* 301 U. S. 174.

Rule 84 of the Rules of Civil Procedure for the District Courts of the United States has definitely told the practitioner that he had a right to fully rely on the official forms which are deemed thereafter to be sufficient.

Rule 83 of the Rules of Civil Procedure permits the District Court by a majority of the judges to amend the rules governing its practice not inconsistent with these rules, and are to be furnished to the Supreme Court.

Therefore, where the District Court for the Southern District of New York furnishes official forms for use at compulsory pre-trial procedure a seaman litigant relying on the pre-trial order which is drawn by the pre-trial judge on the official form may not be constitutionally deprived of his cause of action for unseaworthiness because the Court of Appeals holds that the said official form is ambiguous and has inconsistent provisions. A rule of a Federal Court cannot overcome the plain command of a statute.

Holiday v. *Johnston,* 313 U. S. 342.

Moore on Federal Practice (2nd Ed.) states:

> "815 The Official Forms
> Court and counsel have been materially aided by the official forms which established good pleading in the particular case covered by the form clearly illustrates the simplicity that is desired. . . . **Any doubt that the official forms 'are sufficient to withstand attack under the rules under which they are drawn and that the practitioner using them may rely on them to that extent', has been definitely dispelled by the 1946 amendment to Rule 84".**

Thus the District Court having promulgated official forms pursuant to the authority of Rule 83 must be bound by the sufficiency of its forms under the intent of Rule 84. It certainly would have no right to deny to a litigant the sufficiency of its own forms and delete a cause of action by holding in the next breath that the form was ambiguous and cause the litigant to be deprived of a substantive cause of action of unseaworthiness.

To hold otherwise, would mean that the District Court had promulgated a void rule since it was inconsistent with

the rules. In that event, the petitioner could not be bound by the void pre-trial order when petitioner informed the trial court that the void order did not incorporate his intentions and represented a mistake in fact.

In no event can petitioner be charged with having made an agreement when it clearly appears throughout the trial that there had never been a meeting of the minds.

The official form under discussion is attached and marked Exhibit "A".

The decision of the Court of Appeals points out that the pre-trial order had stated that "liability for unseaworthiness had been asserted in the complaint *and the pre-trial order had stated that none of the issues raised by the pleadings* were abandoned."

In addition to the above the pre-trial order stated:

> **"2. The parties agreed that the trial of this action shall be based upon the pleadings. . . ."**

At the outset of the complaint, it is clear that plaintiff is asserting rights under the Jones Act as well as rights under the general maritime for indemnity (under the general maritime recovery could be had for indemnity only for unseaworthiness). The Complaint reads:

> "Plaintiff brings this action under the Jones Act of Congress and the general maritime to recover indemnity for personal injuries and alleges:"

Paragraph "Seventh" of the Complaint sets forth allegations of unseaworthiness in addition to negligence. It may be noted that unseaworthiness as its very name implies is a form of maritime negligence based on the duty to furnish a staunch, seaworthy ship with appliances and equipment that will withstand the trials of the voyage. Please note the reference repeated throughout to the cause of action based on unseaworthiness. In fact a fair reading

of this paragraph of the Complaint shows that the unseaworthiness allegations are almost completely intertwined with those pertaining to Jones Act negligence so as to hardly leave a line of demarcation.

> "Seventh.—That said injuries were not caused by any negligence or want of care on the part of the plaintiff, but wholly and solely by reason of the negligence, carelessness and want of care on the part of the defendant, its agents, servants, and employees *and the unseaworthy condition of the vessel and its appliances,* in that they failed to provide plaintiff with a safe place in which to work; *in that they failed to provide plaintiff with proper, safe, suitable and seaworthy appliances;* in negligently causing and permitting accumulation to be and remain in the alleyway leading from said galley to said companionway; in negligently causing and permitting said alleyway to be and remain in a slippery and dangerous condition; in negligently causing and permitting an accumulation that was dangerous and slippery in close proximity to said companionway; in negligently and carelessly failing to provide and maintain proper appliances in a safe, seaworthy and insulated condition; in failing to promulgate and enforce proper and safe rules for the safe conduct of said work; in causing and permitting said frigidaire to become unseaworthy; in negligently causing and permitting a dangerous condition to be and remain; *in that they failed to maintain proper, safe and seaworthy appliances in a safe and seaworthy condition;* in that with full knowledge of the dangerous condition of the alleyway, they failed to take adequate precautions for descending the companionway."

Petitioner himself was produced under the Rules of Civil Procedure and his deposition was taken some five months before by the defendant. At the trial, respondent

used this deposition in cross examination of the petitioner. Thus, respondent had ample opportunity to ascertain in full what petitioner claimed as his cause of action for unseaworthiness.

Further, it is too clear to argue that if petitioner were going to abandon issues as to unseaworthiness, there would have to be some mention of this abandonment in the pre-trial proceedings. On the contrary Paragraph 2 of the Pre-Trial order emphatically points out: **"that no issues raised by the pleadings are abandoned."**

Nor was there under Calendar Rule 15 of the Southern District of New York rule promulgated under Rule 83 of the Federal Rules of Civil Procedure, "any tender of issue in the pleadings that is to be abandoned."

Nor was there a motion by the respondent to strike issues of unseaworthiness from the Complaint. Yet without even a mention of this, the Court of Appeals has contrued the Pre-Trial order as the intended result of both parties to be an abandonment of allegations of unseaworthiness, or a striking out of this cause of action.

In the case at bar petitioner's attorney through no fault of his own and because of an ambiguity made by an official form was surely caught in just this type of technicality which the Rules of Civil Procedure were drafted to avoid.

Under such circumstances, even if it were not asked it was the duty of the trial judge to modify the pre-trial order to prevent manifest injustice. The judge was fully aware of the problem. In fact, it was the judge's interpretation of the pre-trial order that placed petitioner's attorney in the dilemma. It would be defeating the very purpose of the rule which was to strike useless shackles of procedure to the end that a fair trial of the essential questions could be had.

If the allegations of negligence and unseaworthiness in the Complaint are to be stricken unless they conform to paragraph 8 of this form, then in fairness to litigants and their attorneys, the Court which created this ambiguity by the interpretation of its Court of Appeals should strike paragraph 2 from its official forms.

Surely, Rule 16 was not meant by its liberal provisions to penalize litigants, because the Court and the pre-trial judge used an official form in use in the Southern District of New York at all pre-trials which the construction of its Court of Appeals now holds to be ambiguous, and resolves the ambiguity in this case against a seaman who has lost both legs.

Reason Three for Granting the Writ.

The interpretation is contrary to the law enunciated in other circuits.

In its strict interpretation of the pre-trial order the Court of Appeals of the Second Circuit promulgated a rule of law neither within the spirit, nor the letter of Rule 16 of the Rules of Federal Procedure.

Geopulos v. *Mandes,* DDC. 1940, Dept. of Just. Bull. No. 103, Rule 16 Rules of Civil Procedure;

Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. *Flynn* (CCA Dist. of Columbia);

Maryland Casualty Co. v. *Rickenbaker* (CCA 4th);

Mayfield v. *First National Bank of Chattanooga, Tenn.* (CCA 6th);

Snyder v. *Dravo Corp.;*

McDowell v. *Orr Felt & Blanket Co.* (CCA 6th);

Pepper v. *Truitt et al.* (CCA 10th).

FIRST.

The Court of Appeals wrote:

> **"If the plaintiff wished to present other issues at the trial he should have asked for an amendment of the pre-trial order which he failed to do."**

In *Pepper* v. *Truitt et al.*, 158 F. 2d 246, the Court of Appeals of the 10th Circuit wrote:

> "A pre-trial order certified to us after argument shows that Henderson left the Truitt home on June 12, 1940. **The appellants now, however, deny the correctness of this date and seek to be relieved of its effect.** When the pre-trial order was entered, the date of Henderson's departure did not appear to be a crucial fact in the law suit, **and we are not disposed to hold the appellant's to this date in the circumstances.** Pre-trial agreements are the product of professional co-operation. They are generally arrived at voluntarily in the interest of time and economy, and in order to dispense with the necessity of formal proof of matters about which there is no substantial dispute. Their utility as an implement in the administration of justice necessarily depends upon their flexibility. If they are to serve their useful purpose, they must not be used to work a hardship or an injustice on those who have freely co-operated in furtherance of juridical efficiency. A lawyer should not be bound by an admission of a fact in a pre-trial agreement which, at that time, appeared to be inconsequential but which later became crucial and doubtful. The case is reversed and remanded."

Moore on Federal Practice, Volume 3, page 1130, Sec. 16.20 states:

> **"Modification of the pre-trial order.**

As stated in the preceding section, the pre-trial order is ordinarily binding on the parties, if it were

not, the pre-trial conference would lose much of its effectiveness. (King *v.* Edward Hines Lumber Co., D. Or. 1945, 68 F. Supp. 1019.) The court may, however, modify the order 'to prevent manifest injustice.' **Thus where the defendant had apparently waived a defense at the pre-trial hearing, yet insisted that he had not intended a waiver, the Court permitted the defense to be set up but required the defendant to indemnify the plaintiff for costs occasioned by the defendant's conduct.** Geopulos *v.* Mandes, DDC. 1940, Dept. of Just. Bull. No. 103. 4 FR Serv. 16:33, Case 1). In another case, the court at pre-trial determined that certain instruments relied on by plaintiff were lacking in mutuality and were not contracts. Plaintiff thereafter moved for leave to file an amended complaint setting forth additional facts which if true would have made the agreements enforceable. The trial court denied leave to amend, but this was reversed on appeal, the appellate court holding that plaintiff was acting in good faith and should have been given the opportunity to submit the actual facts (McDowall *v.* Orr Felt & Blanket Co., CCA 6th, 1944; 146 F. 2d 136, 8 FR Serv. 15a 21 case 10). **Reversal was similarly ordered where the Trial Court refused to permit the injection of a new issue at trial because the parties had stipulated to a contrary fact situation, since no substantial inconvenience would have resulted and it would have inflicted a manifest injustice to have held the party to the stipulation.** Maryland Casualty Co. *v.* Rickenbacker, CCA 4th, 1944; 146 F. 2d 751; 8 FR Serv. 15a 21 Case 11.) It is fair to say that while parties should normally be held to admissions carefully and solemnly made, on the other hand, the pre-trial order must not be an inexorable decree. Designed to promote litigation on the merits, the pre-trial must not, of course, be used to thwart its very objective.''

In *Maryland Casualty Co.* v. *Rickenbacker* (146 F. 2d 136), the Court of Appeals of the 4th Circuit wrote:

> "In any event, it is obvious that a stipulation of counsel originally designed to expedite the trial should not be rigidly adhered to when it becomes apparent that it may inflict injustice upon one of the contracting parties. Such we think was the situation in the case at bar, and the importance of avoiding such a result greatly outweighs the relative inconvenience to which the parties and court might have been subjected if the motion of the Casualty Company had been granted."

This decision has been cited and followed by many of the Courts, as a leading authority in the interpretation of Rule 16.

In *McDowall* v. *Orr Felt Co.* (146 F. 2d 136), the Court of Appeals of the 6th Circuit wrote:

> "The rule continues, confirms, and emphasizes the practice in effect prior to its adoption, in which liberality in amendment was encouraged and favored where no prejudice or disadvantage was suffered by the opposing side." Norton *v.* Larney, 266 U. S. 511; Taylor Co. *v.* Anderson, 275 U. S. 431; In re Haskell, 7 Cir., 73 F. 2d 879.

In *Snyder* v. *Dravo Corp.*, 6 F. R. D. 546, in a lengthy opinion following *Maryland Casualty Co.* v. *Rickenbacker* (*supra*), the Court held:

> **"Furthermore a stipulation of counsel representing a party litigant, originally designed to expedite the disposition of questions which exist should not be rigidly adhered to when it becomes a manifest injustice upon said litigant.** Maryland Casualty Co. *v.* Rickenbacker *et al.*, 4 Cir. 1944; 46 F. 2d 751."

In *Phoenix Mut. Life Ins. Co. of Hartford, Conn.* v. *Flynn* (171 F. 2d 982, U. S. Court of Appeals, Dist. of Columbia Circuit), the Court held:

> "There was ample authority for the trial court to amend the pre-trial order **and it seems very clear to us that a manifest injustice would have resulted had not the Trial Court taken the action it did".**

Judge Fee in *Calvin* v. *West Coast Power Co.,* 5 Fed. Rules Service 16:33; U. S. Dist. Ct. D. Oregon, Nov. 24, 1941, Dept. Just. Bull. No. 135, held that a pre-trial order based on an agreement of the parties which did not clearly set forth their contentions, should be set aside and another pre-trial conference ordered, with the direction that upon the formulation of the pre-trial order, the trial should immediately follow.

In *King* v. *Edward Hines Lumber Co.,* (68 F. Supp. 1019), Judge Fee pointed out **"that the pretrial order official form handed out by the Court for the use of the Court and litigants had a special provision stating that henceforth the pleadings pass out of the case which is in sharp contrast to the forms used in the Southern District of New York which stated that "the trial of this action shall be based upon the pleadings".** But even the Oregon form which put the parties on full notice added the provision that the pre-trial order could be amended only by consent of the parties **or by the Court to prevent manifest injustice.**

In the case at bar, it is clear that plaintiff's attorney throughout the trial in constantly claiming the right to adduce proof of unseaworthiness of the scupper and in his requests to charge had not the slightest intention to waive the allegations of the complaint respecting unseaworthiness (App. to Defendant-Appellee's Brief, p. 61a):

"Mr. Fogler: I respectfully disagree, your Honor. May I point out, on the question of unseaworthiness and negligence, if that condition existed prior——

The Court: Mr. Fogler, you and I have discussed, out of the hearing of the jury, this question of unseaworthiness. I thought it was perfectly well understood, in your pretrial procedure before Judge Leibell, you had waived the issue of seaworthiness.

Mr. Fogler: **I am sorry, your Honor, if I gave that impression. I haven't waived it as yet.**

The Court: Then look at the order.

Mr. Fogler: Would your Honor wish to—I looked at it last night, your Honor, after your Honor called my attention to that fact.

The Court: **Well, in any event, now, we needn't discuss that. That is a legal problem that you and I may have differences of view on, and it is not a concern of the jury."**

It is thus seen that the Court was apprised that there had been no waiver. The Court expressed the view that the pre-trial order had in effect made the waiver as a matter of law and that the pre-trial order was, therefore, inexorable during the course of the trial.

That the seaman's attorney still adhered to his views that there was no waiver can be seen even toward the end of the trial. The Court's rulings that the plaintiff was bound by the pre-trial order also continued under the misapprehension that plaintiff had elected his remedies and was bound by the pre-trial order (Brief for Plaintiff-Appellant, p. 28).

Plaintiff's requests to charge unseaworthiness and Jones Act negligence appear in his requests to charge numbered 7, 8, 9, 10, 11 and 15.

The request was repeated after the Charge of the Court.

"Mr. Fogler: Your Honor, at this point I just wanted to note in the record I have an exception on

my request on the unseaworthiness; that they would be absolutely liable if there were water in the alleyway that night.

The Court: **I don't know what you mean by that, Mr. Fogler, but in any event, so that there will be no doubt about it, I will state now for the record what my position is with respect to this unseaworthiness that has kept popping up here like King Charles' head all the time * * * there is nothing** in the issues as framed in the pretrial order about an issue of unseaworthiness. There are there only issues of negligence, and I take that to mean that at the pre-trial conference you made an election to proceed on the theory of negligence, and you did it before this very experienced Judge, who set up issues of negligence only and not an issue of unseaworthiness. So **I deem you to be bound by the election that was made, and I deem you to be bound by the pretrial order, which sets up only issues of negligence".**

SECOND.

The Court of Appeals wrote:

> **"But the pre-trial order enumerated the only issues to be dealt with at the trial, and these were limited to questions raised by the allegations of negligence."**

Aside from the pleadings the only issues relating to the allegations pertaining to the cause of the accident and the responsibility therefor appear in 8 of the pre-trial order as follows:

> 8. "The issues to be tried are formulated by the Court as follows:
>
> (6) Did the plaintiff fall in the alleyway, and on the ladder, because of the wet condition of the

alleyway, leading to the companionway, on the galley deck?

(7) Was defendant negligent in permitting the alleyway to remain in a wet and slippery condition?

(8) What caused the wet and slippery condition, if it existed?

We note that the pre-trial order has 13 subdivisions in paragraph 8 and was signed on November 13, 1951.

Of these 13 subdivisions, only subdivision 7 deals with defendant's negligence in two short lines.

Paragraph 8 subdivision 7 of the pre-trial order reads:

"(7) Was defendant negligent in permitting the alleyway to remain in a wet and slippery condition?"

The construction leaves out entirely subdivision 8 of paragraph 8, and renders this subdivision entirely meaningless despite the pre-trial Judge's statement after framing number 7 relating to negligence, that number 8 "That is another issue, is it not?" (plaintiff-appellant's reply brief p. 13). It is clear that issue number 7 was designed as to negligence and issue number 8 was designed to protect the matter set forth in the complaint as to unseaworthiness, because of the difficulties of consultation with the client who suffered so many operations and prolonged hospitalization.

Paragraph 8 subdivision 8 of the pre-trial order reads:

"(8) What caused the wet and slippery condition, if it existed?"

That the purpose of subdivision 8 of paragraph 8 was meant to protect the issue of unseaworthiness, appears in number nine of plaintiff's requests to charge, *which was refused.* (Appendix to plaintiff-appellant's brief, p. 200.)

"(9) I charge you that if you find that the alleyway was wet and slippery because of accumulations of water at the entrance to the engine room from the port alleyway, you may find unseaworthiness if this was due to a plugged up scupper which was not in a seaworthy condition prior to January 15th, 1949, when the vessel left port on the voyage on which plaintiff was claimed to have been injured."

The only other subdivisions relating to negligence are subdivisions 9 and 10 which deal with sole or contributory negligence of the plaintiff which would be in the case based on negligence or unseaworthiness.

No other issues of the 13 concern the defendant's negligence leaving it all in the two lines in subdivision 7.

Thus the two short lines of subdivision 7 have been used by the trial court to find that plaintiff had made an election of remedies which we have shown is contrary to law (*McCarthy* v. *American Eastern Corp.*, 175 F. (2d) 943).

The Court of Appeals placed a strained construction on the pre-trial order to uphold a misconception of the law as understood by the Trial Court, and is contrary to the plain wording of the order expressed in paragraph 2.

Reason Four for Granting the Writ.

The decision of the Court of Appeals, Second Circuit, is in conflict with leading decisions of this Court.

1. Even assuming that the pre-trial order effected a stipulation by the seaman to be bound by this ambiguous order, the Trial Court should have relieved the plaintiff from this stipulation.

Carnegie Steel Co. v. *Cambria Iron Co.*, 185 U. S. 403;

Russell-Miller Milling Co., Inc. v. *Todd, et al.*, C. A. 5th, 198 F. (2d) 167;

Maryland Casualty Co. v. *Rickenbaker,* 146 F. (2d) 751;
Bradford v. *Schmucker,* 135 F. (2d) 996.

2. The defendant could not claim prejudice since it had taken plaintiff's deposition some five months before trial, was fully apprised of the claim and in fact the statements taken by the defendant of its own employees, Simone and Bodden. Also some five months before trial spoke of accumulations of water requiring water to be "bailed out" and men working for several days on this plugged scupper to clear it. Its defense was that despite these statements no water was caused to accumulate and that the scupper was never plugged, and was, therefore, not defective. Such defense has the same proof required in this case to defend against a claim of unseaworthiness.

On the other hand plaintiff was caused to be deprived of his cause of action for unseaworthiness.

Balado v. *Lykes Bros. SS. Co.,* 179 F. (2d) 943;
Seas Shipping Co. v. *Sieracki,* 328 U. S. 85;
Mahnich v. *Southern SS. Co.,* 321 U. S. 96;
Socony Vacuum Oil Co. v. *Smith,* 305 U. S. 424;
The Arizona v. *Anelich,* 298 U. S. 110;
The Osceola, 189 U. S. 158;
Steamer H. A. Scandrett, 87 F. (2d) 711;
Strika v. *Netherlands Ministry of Shipping,* 185 F. (2d) 555.

3. To avoid manifest injustice when the incontrovertible record of the Bethlehem Steel Company was introduced showing that on that very trip of plaintiff's claimed injuries, the defendant in the ordinary course of business required that very scupper to be cleared plus the entirely unexpected manner that the record came in evidence after defendant's counsel almost convinced the Court that those records were unavailable, and could not be produced on such short notice, the pre-trial order should have been modified if indeed it

needed modification. This Court has held such a record is entitled to absolute credibility as a matter of law.

Chesapeake & Ohio RR. Co. v. *Martin,* 282 U. S. 891.

1.

In *Carnegie Steel Co.* v. *Cambria Iron Co.* (*supra*) this Court wrote:

> "A stipulation of counsel entered into for the purpose of saving time may be repudiated where the facts subsequently developed show that with respect to a particular matter it was inadvertently signed, provided that notice be given in sufficient time to prevent prejudice to the opposite party".

In *Russell-Miller Milling Co., Inc.* v. *Todd, et al.,* Fifth Circuit held, that justice required that plaintiff be permitted to revoke the stipulation entered into:

> "Federal Courts have on occasion granted relief from stipulations entered into under circumstances similar to those invoked in the instant case. Generally the issue in such cases is whether the Trial Court has properly exercised its discretion in either granting or refusing".

In *Bradford* v. *Schmucker,* the Court held:

> "A Court may in its sound discretion relieve against a stipulation entered into through mistake or misunderstanding of fact . . . (citing cases); or entered into inadvertently, inadvisedly, or improvidently, where under all the circumstances its enforcement would work an injustice".

The principle of law applied in the above cases has been specifically applied to Rule 16 of the Rules of Civil Procedure by many Courts.

Phoenix Mut. Life Ins. Co. of Hartford, Conn. Flynn (*supra*);
Maryland Casualty Co. v. *Rickenbaker* (*supra*);
Calvin v. *West Coast Power Co.* (*supra*);
Snyder v. *Dravo Corp.* (*supra*);
Mayfield v. *First National Bank of Chattanooga, Tenn.* (*supra*).

2.

In *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, this Court held:

> "As to the rights of seaman the liability of a vessel or its owners to members of the crew as an insurer of seaworthiness of its tackle was not recognized by the maritime law of England until established by Statute. Merchants Shipping Act 39 & 40 Vict; Sec. 5; 57 & 58 Vict; C60 Sec. SEC 458. In this country the right of a seaman to demand in addition to maintenance and cure, indemnity for injuries resulting from unseaworthiness, was first recognized by this Court in The Osceola, 189 U. S. 158. In later cases it has been established that due diligence of the owner does not relieve him from this obligation. The Arizona *v.* Anelich, 298 U. S. 110; Socony Vacuum Oil Co. *v.* Smith, 305 U. S. 424; Mahnich *v.* Southern SS. Co., 321 U. S. 96".

Throughout the trial it was apparent that the Trial Court understood from petitioner's attorney that he desired to present proof of unseaworthiness. Petitioner called the issue of unseaworthiness to the attention of the Trial Court. At first the Trial Court refused to allow proof of unseaworthiness on the ground that petitioner (Page 4) was bound by the pre-trial order. Proof of unseaworthiness came into the record by the statement of Simone (Plain-

tiff's Exhibit 10) which in turn came into record from respondent itself without objection by respondent (Stenographer's Minutes, p. 245) and which the Court refused to allow the respondent to withdraw; and with the testimony of Rees (Stenographer's Minutes, 251-265); and the testimony of Dooner (Stenographer's Minutes, 273-282) for the petitioner; and Fraga for the respondent (Stenographer's Minutes, 385-394).

The following is the statement of Simone, respondent's employee for over 25 years, who was specifically charged with the duty of keeping the said alleyway clear and clean. This statement was given to defendant's attorney November 21, 1951, some 5 months before trial (Plaintiff's Ex. 10—Pg. 196, Statement of Joseph Simone).

It is to be noted that the scupper was so plugged that on one occasion Simone required another man who was paid overtime *"to help me bail the water out of the storeroom and the alleyeway"*. On the other occasion it required the services of the bosun, the carpenter and at least one ordinary seaman in addition to Simone.

The following is petitioner's Exhibit 9, the statement of Henry G. Bodden, also given to respondent's attorney on November 21st, 1951 and which concerned the plugged condition of the scupper (Appendix to Plaintiff-Appellant's Brief, p. 195):

> *"I have been on the SS Cape Avinof about 3½ years and am still on board. I am the Chief Cook. Concerning the port alleyway outside the ice boxes I remember that about 3 times the deck there was flooded by water. This was caused by the scupper backing up. At such times men were turned out to correct it as quickly as possible. I remember that one time the water was there for about 2 days before*

it could be corrected altho they were working on it all the time".

It needs no argument that a drain which is plugged for 2 whole days "before it could be corrected altho they were working on it all the time" is an obviously defective and unseaworthy appliance.

It, therefore, appears that on records and statements given to respondent itself it was put on notice long before the trial that the defective and plugged condition of the scupper gave rise to a cause of action for unseaworthiness of the appliance itself, as well as for Jones Act negligence. The defendant, therefore, could hardly urge that it was caught unaware by the request to have the cause of action for unseaworthiness submitted to the Jury.

3.

Also bearing on notice to defendant of unseaworthiness is plaintiff's Exhibit 15, the record of Bethlehem Steel Co., which was an incontrovertible report of the respondent itself to its ship repairer as follows (p. 197) three years before trial.

"Feb. 11, 1949

26. **Inboard Scupper Drain Meat Box:** Clear and prove in good working order.

27. ***Scupper Drains:*** *Clear scupper drains port and stbd. sides lower deck.*

28. **Galley Sink:** Alter piping to galley sink as directed".

Although defendant had this record more than three years before trial, plaintiff on the other hand, only came upon it toward the close of the trial.

Plain logic dictates even to the landlubber that a scupper which is a drain can only be defective if it can not per-

form the simplest function of letting water go down. If water goes down the drain, no one pays attention to the water or the drain. And nobody, of course, would write a report to Bethlehem Steel Company, the ship repairer in the ordinary course of business to clear that very drain on that very trip unless it did not function properly, and of course, if the appliance worked properly, work by several men for days to clear the drain could not occur.

Chesapeake & Ohio RR Co. v. *Martin*, 282 U. S. 891 has emphasized the proposition that written statements made in the ordinary course of business are entitled to such credence that oral testimony must be subserved to the point where a jury verdict found in contradiction to this typewritten report must be set aside, because of the high probative value of such a report.

All testimony of the defendant in conflict was hard to believe, if not impossible to believe in view of *Chesapeake & Ohio RR* v. *Martin* (*supra*), but if it was in the case, without question the *petitioner deserved to present the issue of unseaworthiness on this record alone no matter what else preceded it.* The stenographic minutes show that the record came in toward the close of the trial when the Bethlehem Steel Co. was subpoenaed. Respondent's counsel urged the Court that the shortness of time in giving the subpoena to Bethlehem Steel Co. made it necessary for him to tell the Court that they could not be produced.

This turned out to be an error, for the records were produced and these records without question showed that much of respondent's testimony was not true. Surely, in the interests of justice, the trial court should have modified its ruling of which it was well aware.

We believe therefore that the rule stated (*supra*) in *Pepper* v. *Truitt* by the Court of Appeals of the 10th Circuit should be applied.

The Trial Court as has been seen (*infra*, Point I), knew that plaintiff's attorney desired to adduce proof of unseaworthiness and told the Court that no waiver was intended. The Trial Court knew that the only reason that the proof of unseaworthiness was not allowed in the case was because the Court specifically ruled that plaintiff had waived this cause of action by the Pre-Trial Order. Surely, when plaintiff's attorney was continually requesting to be allowed to present proof of the issue of unseaworthiness and requested certain charge embracing unseaworthiness was he not asking the Trial Court to relieve him of the Pre-Trial Order? That is assuming, of course, that the Pre-Trial Order by its ambiguous and inconsistent provisions had so bound the plaintiff.

What else could plaintiff's attorney have been doing other than asking the Trial Court to relieve him of the stipulation if in fa this was required. Especially was this true before the case went to the jury and petitioner's attorney asked a charge of unseaworthiness and the Court told him "You needn't elaborate on it because no matter what it is I am not going to charge it."

He could no more quarrel with the Trial Court than he could with the Court of Appeals which has refused a petition for rehearing. His only remedy was by appeal.

That is the reason for Rule 46. It could serve no useful purpose to make any further requests and would only upset the decorum of the Courtroom. A plaintiff's attorney need not risk contempt of Court, to protect the interests of his client. After he has repeatedly tried to bring an issue into the case and the Judge has ruled adversely to him, his only remedy then was on Appeal.

In *Keen* vs. *Overseas Tankship Corp.*, 194 F. 2d 515 (cert. denied) interpreting rule 46 of the Federal Rules of Civil Procedure, Judge Learned Hand wrote:

> "It is indeed true that the plaintiff did not except to that ruling, any more than to the charge; but he had made his point clearly; the judge had overruled him; the defendant's attorney had said that the judge had anticipated the objection he himself was about to make; and these circumstances satisfied Rule 46, which preserves a point, if 'a party * * * makes known to the court the action that he desires the court to take or his objection to the action of the court and his grounds therefor'. Moreover, the plaintiff's failure later to repeat the objection; or to conform literally to Rule 51, was not a waiver of the ruling against him; he had taken his position, had lost, and he was free thereafter to win a verdict if he could within the narrower borders of the case that the judge had laid down for him. Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided. The notion is wholly untenable that in order to protect himself against an imputed surrender, a party must reassert what has been overruled every time the occasion comes up again."

Conclusion.

For the foregoing reasons it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

HENRY FOGLER,
Attorney for Petitioner.

Appendix.

Order of the United States District Court for the Southern District of New York Adopting Local Rules.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

RULES OF PRACTICE IN THIS COURT

PRESENT:

HONORABLE JOHN C. KNOX
HONORABLE HENRY W. GODDARD
HONORABLE WILLIAM BONDY
HONORABLE VINCENT L. LEIBELL
HONORABLE JOHN W. CLANCY
HONORABLE EDWARD A. CONGER
HONORABLE SYLVESTER J. RYAN
HONORABLE SAMUEL H. KAUFMAN
HONORABLE JOHN F. X. McGOHEY
HONORABLE IRVING R. KAUFMAN
HONORABLE GREGORY F. NOONAN
HONORABLE SIDNEY SUGARMAN
HONORABLE EDWARD WEINFELD
HONORABLE THOMAS F. MURPHY
HONORABLE EDWARD J. DIMOCK
HONORABLE DAVID N. EDELSTEIN.

The Circuit Conference for the Second Circuit having heretofore recommended that appropriate steps be taken to formulate uniform rules of practice in the District Courts of this Circuit as nearly as may be; and to that end

committees of practicing attorneys having been appointed in the Southern and Eastern Districts, respectively, to make appropriate recommendations; and the said committees having filed joint interim reports which have been examined and considered by the members of our respective Courts sitting in conference; and final action thereon now being deemed appropriate, this Court upon its own motion does hereby

ORDER (a) The General Rules, the Civil Rules, the Admiralty Rules and the Bankruptcy Rules, attached hereto, are hereby approved and adopted to govern applicable practice in this Court except such rules as are designated as applicable solely to the U. S. District Court for the Eastern District of New York. **The Calendar Rules were approved and adopted by this Court by an order dated June 4, 1951.** The Criminal Rules were approved and adopted by this Court by an order dated December 17, 1951.

RULE 14—Pre-Trial Calendars and Conferences

The chief judge shall supervise the preparation of a pre-trial calendar, and shall preside at the pre-trial calendar call and at the pre-trial conferences to be held pursuant to Rule of Civil Procedure 16, or designate one or more other judges to do so.

RULE 15—Pre-Trial Calendars and Notice of the Pre-Trial Conference

(a) There shall be three pre-trial call calendars to which actions from the respective permanent calendars shall be assigned.

(b) The pre-trial call calendars shall be published in the New York Law Journal and written notice of the call shall be mailed by the calendar commissioner to the attorneys of record. The notice shall inform the attorneys that upon the call the action will be set for a pre-trial conference. It shall further inform the attorneys that at such pre-trial conference each shall be prepared to submit a typewritten

memorandum covering such of the following items as are appropriate:

1. A brief statement of what the plaintiff expects to prove in support of his claim.

2. A brief statement of what the defendant expects to prove as a defense thereto.

3. Similar statements as to any counterclaim or cross-claim of a defendant.

4. Any amendments required of the pleadings.

5. Any tender of issue in the pleadings that is to be abandoned.

6. Any stipulation of facts, as to liability or damages, that the attorney is willing to make, or on which he requests an admission.

7. The details of the damages claimed, or of any other relief sought, as of the date of the pre-trial conference.

8. The documents and records to be offered in evidence at the trial which will be conceded to be genuine or as to which a concession is requested.

9. The names and specialties of experts to be called as witnesses.

10. Any other pre-trial relief which the attorney will request.

The notice shall request the attorneys in preparation for the pre-trial conference, to discuss with each other the matters listed therein.

(c) On the call of a pre-trial call calendar, actions which are not marked settled or otherwise disposed of shall be placed on a pre-trial conference calendar for a day certain. The pre-trial conference calendar shall be published in the New York Law Journal.